United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 11, 2000

TO: Victoria E. Aguayo, Regional Director

Region 21

FROM: Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Prime Time Products, Inc. 530-6001-5000

Case 21-CA-33718 530-6067-0150 530-6067-2020 530-6067-2060

530-6067-2060-2700 530-6067-2060-7700 530-6067-2060-8400 530-6067-2060-8800

530-6067-2080

530-6067-2080-6200

This Section 8(a)(1) and (5) case was submitted for advice as to whether the Employer bargained in bad faith during negotiations with the Union, based upon the content of its contract proposals.

FACTS

On April 5, 1999, 1 Teamsters Local 542 ("the Union") was certified as the exclusive collective-bargaining representative of employees at a facility of Prime Time Products, Inc. ("the Employer"). Thereafter, Union and Employer representatives met six times between May 20 and December 8 to negotiate the parties' initial collective-bargaining agreement. There are no allegations that the Employer committed any procedural violations with respect to its duty to bargain in good faith with the Union. Rather, the gravamen of the charge is that the content of the Employer's proposals, particularly its Management Rights, Disciplinary Procedure, Grievance Arbitration and No-Strike/No-Lockout clauses, manifested bad faith bargaining.

At the parties' last meeting on December 8, the Employer informed the Union that it "had reached its bottom line" and that further negotiations would be fruitless. The Union informed the Employer, by letter dated December 9, that it disagreed that a bargaining impasse had been reached and that it was willing to continue negotiating. On December 16, the Employer mailed the Union its last, best

 $^{^{1}}$ All dates herein are 1999, unless otherwise noted.

and final offer. By letter dated January 3, 2000, the Union informed the Employer that the Union had made significant concessions from its original proposal and that it was prepared to continue negotiating in good faith in order to reach agreement on outstanding contract matters. To date the Employer has not returned to the bargaining table.²

The Employer's December 16 final offer provides, among other things, that the Employer shall retain control over discipline and discharge; that an employee may be terminated at will, with or without cause or notice; that discipline and discharge matters are excluded from grievance and arbitration; and that discipline or discharge for violation of the No Strike clause is not arbitrable. The most significant clauses are quoted below:

Article 27 - Management Rights Clause

Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives and functions are retained and vested exclusively in the Employer, including, but not limited to, the rights, in accordance with its sole and exclusive judgment and discretion: to reprimand, suspend, discharge, or otherwise discipline employees; to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to promote, demote, transfer, lay off, recall to work, and retire employees; to set the standards of productivity, the products to be produced, and/or the services to be rendered; to determine the amount and forms of compensation for employees; to maintain the efficiency of operations; to determine the personnel, methods, means, and facilities by which operations are conducted; to set the starting and guitting time and the number of hours and shifts to be worked; to use independent contractors to perform work or services; to subcontract, contract out, close down, or relocate the Employer's operations or any part thereof; to expand, reduce, alter, combine, transfer, assign, or cease any job, department, operation or service; to control and regulate the use of machinery, facilities, equipment and other

² The Region has authorized a Section 8(a)(5) complaint alleging that the Employer unlawfully declared impasse without bargaining over wage rates with the Union and refused to return to the bargaining table in response to the Union's January 3, 2000 letter.

property of the Employer; to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery and equipment; to determine the number, location, and operation of departments, divisions and all other units of the Employer; to issue, amend, and revise policies, rules, regulations, and practices; and to take whatever action is either necessary or advisable to determine, manage and fulfill the mission of the Employer and to direct the Employer's employees. The Employer's failure to exercise any such right, prerogative or function hereby reserved to it, or the Employer's exercise of any such right, prerogative or function in a particular way shall not be considered a waiver of the Employer's right to exercise such right, prerogative or function, or preclude it from exercising the same right in some other way not in conflict with the express provisions of this Agreement.

Article 4 - Disciplinary Procedure

Section 1. An employee may be disciplined, suspended, or discharged, for any reason not prohibited by law. It is agreed that the employer must retain the ability to discipline its employees where it determines that such action is warranted by the circumstances. It is further agreed that employment with the Employer is for an indefinite and unspecified duration and no employee job classification or subclassification guarantees employment for any specific length of time. Employment is to be at the mutual consent of the employee and the Employer. Accordingly, either the employee or the Employer can terminate the employment relationship at will, at any time, with or without cause or advanced notice.

Article 5 - Grievance and Arbitration Procedure

H. The powers of the arbitrator are limited as follows: his/her opinion and award shall be confined exclusively to the interpretation and/or application of the express provision(s) of this Agreement at issue between the Employer and the Union. He/she shall have no authority to decide issues involving the discipline or discharge of employees; to add to, subtract from, or modify the terms of this Agreement; to impose on either party a limitation or obligation not explicitly provided

for in this agreement; or to establish or alter any wage rate or wage structure.

Article 16 - No Strike, No Lockout

During the term of this Agreement, or during any agreed extension period thereof, there shall be no lock-out, strike, including sympathy strikes, slow down, sit-down, work stoppage or any other form of job action of any type and for any reason by the Union, its officers, agents, representatives, stewards, committeemen and members and all other employees or by the Employer. This prohibition shall apply whether or not any such strike, sympathy strike, slow down, sit-down, work stoppage or any other form of job action involves a matter subject to the grievance and arbitration procedures set forth herein or involves a matter specifically referred to or covered in this agreement or involves a matter which has been discussed between the Employer and the union. employee or union officer, agent, representative, steward or committeeman who fails to comply with these provisions will be subject to immediate discipline, including discharge, and such discipline shall not be subject to the arbitration provisions set forth herein. In the event of an alleged violation of this Article, the Employer may immediately apply to the United States District Court for the Southern District of California for injunctive relief, including a temporary restraining order. In addition to any other remedy set forth in this Article, the Employer may seek damages against the Union for any damages suffered by the Employer as a result of a violation of this Article.

The Disciplinary Procedure clause contained in the Union's third contract proposal, dated December 6, does not include the language providing for termination of the employment relationship "at will, at any time, with or without cause or advanced notice;" this provision was added to the Employer's second contract proposal, dated November 9. Nor does the Union's third contract proposal exclude discipline or discharge matters from grievance arbitration; this provision was also added to the Employer's second contract proposal. Likewise, although the Union's third contract proposal incorporates most of the No Strike-No Lockout language proposed by the Employer, it does not contain the provision, added to the Employer's second contract proposal, that discipline of any employee, union

officer, agent, representative, steward or committeeman for violation thereof is not subject to arbitration.

ACTION

Based upon the content of the Employer's contract proposals, we conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) and (5) by failing and refusing to bargain in good faith with the Union.

Section 8(d) of the Act does not require parties engaged in collective-bargaining to agree on their respective proposals, but does require more than a willingness to enter upon a sterile discussion of union-management differences.³ The parties must enter discussions with open and fair minds and with the purpose of reaching agreement.⁴ Thus, an employer is "obliged to make some reasonable effort in some direction to compose his differences with the union..."⁵

The Board draws a distinction between lawful "hard bargaining" and unlawful "surface bargaining." The Board will find bad faith bargaining based upon the content of an employer's proposals if a party's bargaining position and proposals "indicate an intention by the [employer] to avoid reaching an agreement." Thus, although the Board will not determine whether a proposal is acceptable or unacceptable to a party, it will "consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract."

³ NLRB v. American National Insurance Co., 343 U.S. 395, 402 (1952); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

⁴ NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960), reh'g den. 277 F.2d 793 (5th Cir. 1960); Majure Transport Co. v. NLRB, 198 F.2d 735, 739 (5th Cir. 1952).

⁵ Atlanta Hilton & Tower, 271 NLRB at 1603, quoting NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1953), cert. den. 346 U.S. 887 (1953).

⁶ A-1 King Size Sandwiches, 265 NLRB 850 (1982), enf'd 732
F.2d 872 (11th Cir. 1984), cert. den. 469 U.S. 1034; Litton
Microwave Cooking Prod ucts, 300 NLRB 324, 327 (1990), enf'd
949 F.2d 249 (8th Cir. 1991), cert. den. 112 S.Ct. 1669
(1992).

 $^{^{7}}$ Reichhold Chemicals, 288 NLRB 69 (1988), aff'd in relevant part, 906 F.2d 719 (D.C. Cir 1990).

It is well-settled that an employer's proposal of, and insistence upon, a broad management rights clause is not per se unlawful. The Board has also stated that an employer's unwillingness to agree to an arbitration provision is not, by itself, a sufficient basis for finding bad faith, that refusal to provide for just cause discipline is not inherently unlawful, and that insistence upon a waiver of statutory rights as a part of an employer's overall bargaining position does not require a finding of bad faith. 11

Thus, the Board does not necessarily view a party's insistence upon such proposals individually to be in derogation of its duty to bargain in good faith. However, where an employer insists upon a broad management rights clause and a no-strike clause during negotiations, while at the same time refusing to agree to an effective grievance and arbitration procedure, the Board has consistently found bad faith bargaining. 12

In <u>A-1 King Size Sandwiches</u>, above, the Board noted that the General Counsel's surface bargaining complaint rested almost entirely upon the terms of the respondent's bargaining proposals, and that, "[s]ometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to."¹³ In finding a Section 8(a)(5) violation, the Board stated that the employer's proposals "would strip the union of any effective

⁸ See American National Insurance Co., 343 U.S. at 409;
Tritac Corp., 286 NLRB 522, 523 (1987); Commercial Candy
Vending Division, 294 NLRB 908, 909 (1989).

⁹ Tritac Corp., 286 NLRB at 523.

¹⁰ Coastal Electric Cooperative, 311 NLRB 1126, 1127 (1993).

¹¹ See Hydrotherm, Inc., 302 NLRB 990, 994 (1991), citing
Reichhold Chemicals, 288 NLRB at 71.

¹² San Isabel Electric Services, 225 NLRB 1073, 1079 fn. 7 (1976); Hydrotherm, above at 994.

A-1 King Size Sandwiches, 265 NLRB at 858, quoting NLRB v. Wright Motors, 603 F.2d 604, 609-610 (7th Cir. 1979). See also Pioneer Asphalt, Case 36-CA-6972, Advice Memorandum dated May 24, 1993 (authorizing Section 8(a)(5) complaint in the absence of any other indicia of bad faith, where employer insisted on broad management rights, limited arbitration and no-strike proposals).

method of representing its members...further excluding it from any participation in decisions affecting important conditions of employment." 14 The Board further noted that, if accepted, the proposed contract would have left the union with fewer rights than if it relied solely upon its certification, which would require the employer to bargain each time it sought to change an existing term or condition of employment, and which gave the union the right to strike in protest of such actions and in protest of conduct violative of the employees' other legal rights. 265 NLRB at 860.15

In Prentice-Hall, Inc., 290 NLRB 646, 646 (1988), the Board upheld the ALJ's finding of a Section 8(a)(5) violation, agreeing that, "the combination of the Respondent's proposals on management rights, grievance and arbitration, 'sole recourse,' and prohibitions against strikes rendered substantial portions of the proposed contract virtually unenforceable." The management rights proposal reserved to the employer the right, among other things, to discipline and discharge, promote, demote, set hours, determine and require overtime, and subcontract unit work. Id. at 651. In addition, because disciplinary decisions were grievable but not arbitrable, the ALJ characterized the employer's reluctant "concession" that discipline be for just cause as illusory, inasmuch as the employer was the final arbiter of such decisions, the "sole recourse" proposal limited the union to filing a grievance, and the union was foreclosed from engaging in self-help or a contract action to enforce the just cause standard or correct an alleged breach thereof, in view of the broad nostrike article and the sole recourse provision. Id. at 669. The Board acknowledged that the respondent had appeared

 14 265 NLRB at 859, quoting <u>San Isabel Electric Services</u>, <u>Inc.</u>, 225 NLRB at 1080.

¹⁵ See also South Carolina Baptist Ministries, 310 NLRB 156, 157 (1993), where the Board noted that the employer's unyielding opposition to arbitration, in combination with sweeping provisions in its management rights clause arrogating to it the exclusive right to change or abolish job classifications, to discipline and discharge without just cause, to change unilaterally all existing working conditions and fringe benefits not provided for in the contract, to use leased employees and non-unit employees to perform bargaining unit work, and to promulgate and enforce rules governing work and non-work employee conduct, both during and outside working hours, would leave the union with fewer rights than imposed by law without a contract.

regularly at the bargaining table and reached agreement on some subjects, but concluded that the totality of the record demonstrated that the respondent was not negotiating in good faith with a view toward reaching a complete agreement with the union. Id. at 647.

Similarly, in Hydrotherm, above, 302 NLRB at 994, the Board found that the totality of the employer's positions, and the manner in which they were advanced, was inconsistent with a good faith approach to negotiations. Referring to the management functions, discharge and suspension, grievance/arbitration, and no-strike clauses, the Board stated that the employer's proposals "amounted to little more than a demand for the surrender" of the rights the union possessed by virtue of its certification as the employees' exclusive representative within the meaning of the Act. Id. The management functions clause vested the employer with total authority over numerous subjects, including discharge, layoff, demotion, scheduling, and the size and makeup of the bargaining unit, 302 NLRB at 990, and allowed it to act unilaterally on almost every aspect of wages and working conditions, 302 NLRB at 994. The Board also termed the employer's just cause discharge proposal illusory, in that discharge for violation of any rule the employer issued pursuant to its unrestricted rulemaking powers would necessarily be for just cause. Id. Moreover, even if such action was arbitrable, an arbitrator could not order reinstatement or backpay, and if the union (taking advantage of a limited exception to the broad no-strike clause) struck over the discharge, the strike would be deemed an economic strike. Id. The Board distinguished Reichhold, where the employer made significant movement in bargaining on important subjects (288 NLRB at 70), stating that the employer in Hydrotherm had offered little more than the status quo in return for the union's sweeping waivers. Id.

An examination of cases in which the Board has found lawful hard bargaining reveals notable distinctions from the above decisions. For example, in Aztec Bus Lines, 289 NLRB 1021 (1988), the Board affirmed, without discussion, the ALJ's conclusion that the employer had engaged in lawful hard bargaining. One of the General Counsel's primary contentions was that the employer's position on management rights and arbitration, prior to the date it changed its position in part, was designed to allow management to make unilateral changes in employee basic rights and protected activities without recourse. Id. at 1042. In rejecting this theory, the ALJ found significant the fact that the employer, in its final proposal, agreed to add a "just cause" standard to the discipline and discharge language of its management rights clause, and agreed to modify the

arbitration clause so that an arbitrator's decision would be "final and binding" on the parties rather than "advisory." $\underline{\text{Id.}}$ at 1043.

In <u>Commercial Candy Vending Division</u>, above, the Board reversed the ALJ's finding of bad faith bargaining in violation of Section 8(a)(5) and (1). The Board held that although the employer insisted upon a broad management rights clause and a no-strike provision, the employer had engaged in lawful hard bargaining because the employer's proposal did not exclude its exercise of management rights from the purview of the grievance procedure and the employer did not refuse to agree to an effective grievance procedure. 294 NLRB at 909.

More recently, in Coastal Electric Cooperative, above, the Board, reversing the ALJ, again concluded that the employer had engaged in lawful hard bargaining. The parties, negotiating for an initial contract, had agreed upon a number of subjects, but disagreed on several key issues, including management rights (specifically, those terms and conditions over which the employer wished to reserve control), employment-at-will, just cause, arbitration, seniority and wages. 311 NLRB at 1126. The Board stated that the first paragraph of the management rights clause, which the parties had agreed to early on, expressly provided that management's reservation of authority was limited by whatever the parties agreed to elsewhere in their contract. 311 NLRB at 1127. addition, the Board noted that although the employer adamantly refused to agree to any contractual limit or third party review of its actions, it never insisted that the union waive its right to strike. Id.

Applying the foregoing principles to the instant case, we conclude that the Employer's Management Rights, Disciplinary Procedure, Grievance and Arbitration, and No-Strike clauses, taken together, manifest bad faith bargaining. The net effect of these provisions would be to grant to the Employer unfettered control over fundamental terms and conditions of employment.

In Prentice-Hall, above, the ALJ (affirmed by the Board), found bad faith bargaining based upon the content of the employer's contract proposals, noting that while no terms or conditions of employment were excluded from the grievance procedure, a significant number were non-arbitrable, among them discipline, wages, seniority and subcontracting. 290 LRB at 670. Moreover, the respondent insisted upon a broad no-strike clause. Id. Similarly, in the instant case, the Employer would retain the power to discipline or discharge employees with or without cause or

notice; such matters, even if grievable, are expressly excluded from arbitration; and the Union cannot strike over such matters. In addition, the Employer can unilaterally establish the amount and forms of compensation; wage issues are non-arbitrable; and the Union is prohibited from striking over wages, regardless of whether they are grievable. 16

Thus, the Employer's proposals would strip the Union of any effective method of representing its members, further excluding it from any participation in decisions affecting discipline, discharge or wages (arguably the most important terms and conditions of employment). A-1 King Size Sandwiches, 265 NLRB at 858; NLRB v. Wright Motors, 603 F.2d at 609-610. The Employer's proposal would leave the Union with fewer rights than if it relied solely upon its certification. 265 NLRB at 859; Hydrotherm, Inc., 302 NLRB at 994; San Isabel Electric Services, 225 NLRB at 1080.

Moreover, the instant case is distinguishable from cases where the Board found lawful hard bargaining. Thus, unlike the respondent in Aztec Bus_Lines, above, which agreed upon both a just cause discipline and discharge standard and a binding arbitration provision, the Employer here is insisting upon an employment-at-will provision, and a grievance procedure which excludes discipline and discharge from the scope of arbitration. 289 NLRB at 1043. In Coastal Electric Cooperative, above, the respondent insisted upon employment-at-will language and refused to agree to arbitration, but did not insist upon a no-strike provision. 311 NLRB at 1127. In the instant case, the Employer has proposed an employment-at-will provision, a grievance procedure which specifically exempts discipline and discharge matters from arbitration, and a broad nostrike clause. Thus, unlike Coastal Electric Cooperative, the Union has no self-help remedy available to it. Further, although the employer in Commercial Candy, above, proposed a broad management rights clause and a no-strike provision, the Board found that because the management rights clause was within the scope of an "effective" grievance procedure,

¹⁶ Here, although the Management Rights clause at issue begins, "Except as expressly modified or restricted by a specific provision of this Agreement...," the instant case is distinguishable from Prentice-Hall and Coastal Electric Cooperative inasmuch as there is no just cause discipline and discharge standard, nor arbitral review of discipline or discharge matters, and the Employer here has proposed a broad no-strike provision. We note that the Union apparently contemplated accepting some No Strike-No Lockout provision provided that discipline and discharge matters would be arbitrable.

the respondent had not engaged in bad faith bargaining. 294 NLRB at 909. However, as set forth above, we find that a grievance procedure which excludes such vital employment matters as discipline, discharge and wages from the scope of arbitration cannot be termed "effective."

Accordingly, based upon the content of its contract proposals, we conclude that the Employer has failed to bargain in good faith with the Union. The Region should therefore issue complaint, absent settlement, alleging violations of Section 8(a)(1) and (5).

B.J.K.